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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 513

SUSAN BEAUMONT,
PETITIONER,

v.

CHRISTIAN W. AUSSENHEIMER, ET AL,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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Opinions Below

The opinion of the Court of Appeals (Pet. 25-34) is reported at 427 F.2d 667. The opinion of the District Court has not been reported but is set out in the petition, pp. 20-24.

Question Presented

Susan Beaumont brought a civil rights action under 42 U.S.C. §1983. The question presented by the petition is

whether she adduced sufficient evidence to warrant the jury verdicts that her hospitalization was in violation of her right to due process guaranteed by the Fourteenth Amendment.

Statutes Involved

The pertinent statutes involved are set out in the petition, pp. 35-41.

Statement

Respondents do not dispute petitioners Statement of the Case in so far as it embraces what the jury could have found from evidence most favorable to petitioner. However, petitioners assertion (Pet. 7) that for a court to order a §77 commitment there must be a certificate from two doctors that the person committed would be dangerous if at large, is not correct. Massachusetts General Laws c. 123 §51 provides that the committing judge may make such finding.

Argument

The petition presents no substantial question warranting further review by this Court. The decision of the lower court is correct.

Petitioner urges this Court to grant certiorari on the ground that the decision below conflicts in three respects with decisions in other circuits.

I.

It is argued that the court below held that the legal theory on which the case was submitted to the jury without objec-

tion, does not become the law of the case and that this holding agrees with the Eight Circuit and conflicts with the Fifth and Ninth Circuits.

An examination of the cases cited by petitioner reveals that there is no conflict on this issue.

The law is that if no objection to instructions is made in the trial court a party may not question them on appeal. *El Rancho, Inc.* v. *The First National Bank of Nevada*, 406 F.2d 1205, 1215 (9th Cir. 1968), *cert. denied*, 396 U.S. 875 (1969); *Green* v. *The American Tobacco Co.*, 325 F.2d 673, 676, (5th Cir. 1963), *cert. denied, sub nom. The American Tobacco Company* v. *Green*, 377 U.S. 943 (1964); *Coca Cola Bottling Co. of Black Hills* v. *Hubbard*, 203 F.2d 859, 862 (8th Cir. 1953). Respondents did not question the trial court's instruction on appeal. The Eighth Circuit in *Coca Cola* held that for the purpose of reviewing a ruling on a motion for directed verdict it will apply the law it thinks correct and that it is not confined to an incorrect statement of law contained in instructions.

In *Green* and *El Rancho* supra, the instructions correctly stated the law and in *El Rancho*, the appellant sought to question the instruction for the first time on appeal. Neither Circuit was faced with having to review action on a motion for directed verdict when the instructions incorrectly stated the law as was the First Circuit. Further the Ninth Circuit in *El Rancho* rejected appellant's attempt to question on appeal instructions to which no objection was made and thereby followed *Coca Cola* of the Eighth Circuit. Thus, there is no conflict on this issue as petitioner asserts.

II.

It is further asserted by the petitioner that the Court of Appeals is in conflict with other circuits because its decision impliedly held that respondent's motions for directed

verdicts complied with Rule 50.(a). As petitioner points out this point was briefed and argued below. Therefore, it is implicit also that the court below found from the portions of the transcript cited to it that the trial judge knew the basis of the motions and that there had been substantial compliance with Rule 50. The transcript clearly shows that the decision was correct and applied the law of this Court.

III.

It is fundamental that for petitioner to recover under §1983 a right secured by the Constitution must have been violated. Since she has not challenged the constitutionality of the statutes under which she was hospitalized, the only possible violation would be sufficient non-compliance with them to constitute a violation of the due process clause.

Hospitalization alone is not a violation of a federally protected right. And therefore hospitalization under the justification of state statutes (which were not challenged) clearly is not such violation. Viewing the petitioner's §1983 action up to this point, a motion for directed verdict would be properly granted. What more must she do to overcome such a motion? She must produce evidence that by failure to comply with the pertinent statutes she was not accorded due process. This is what the Court below held when it said that she has the "burden on the issue of justification". If this were not the law, as both the District Court and Court of Appeals stressed, any person could make out a prima facie §1983 action by merely relying on his own testimony of his mental health, leaving the burden of rebuttal and statutory compliance with the defendants.

It is submitted that this Court did not intend such far reaching results when it said in *Monroe* v. *Pape*, U.S. 167, (1961) that §1983 "should be read against the background of tort liability".

The cases petitioner cites in support of her "conflict" on this issue do not withstand scrutiny. *Whirl*, *Joseph*, *Bauers*, *Lynch* and *Calum* all involved plaintiffs who were jailed and who produced evidence of violation of a federally protected right.

Breen v. *Kahl*, 419 F.2d 1034, is not helpful for it involved a state's justification for a regulation the constitutionality of which was challenged.

The remaining cases urged upon the Court as indicative of grave conflict also fail the petitioner. It is submitted that petitioner's threefold claim of conflict among circuits is without merit.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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October, 1970.